INDEX

Table of Authorities Cited

Statutes

Constitutional Provisions

Opinions

Periodicals

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 154

RONALD JAMES, et al., *Appellants,*

vs.

ANITA VALTIERRA, et al., *Appellees.*

On Appeal from the United States District Court for the Northern District of California

APPELLANTS' BRIEF

OPINION BELOW

The Opinion of the District Court will be reported in 313 F.Supp. 1 sub. nom. *Valtierra v. Housing Authority of the City of San Jose, et al.*, and *Hayes v. Housing Authority of San Mateo.* It appears in the Appendix at 168-179.[1]

[1]By advice of the clerk, July 10, 1970, there is a consolidated Appendix for this case and *Shaffer v. Valtierra*, No. 226, October Term, 1970, the two cases being appeals by different defendants from the same judgment. Reference to the Appendix hereafter appears as "A".

JURISDICTION

This is a suit to enjoin enforcement of a provision of the Constitution of California—in the words of the complaint, "to invalidate Article XXXIV of the California Constitution" (Comp. Para. 1; A. 2). The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. § 1983, and the Equal Protection Clause of the 14th Amendment (Complt. Para 2; A. 2).[2] On April 2, 1970, a three-judge court, convened under 28 U.S.C. §§ 2281, 2284, entered summary judgment, comprising a declaratory judgment and permanent injunction (A. 178-9). The Notice of Appeal was filed April 10, 1970 in the District Court (A. 166).

This Court has jurisdiction under 28 U.S.C. § 1253, the appeal being from a permanent injunction by a three-judge court against enforcement of or obedience to a provision of a State Constitution. *Dandridge v. Williams,* 397 U.S. 471 (1970); *Florida Lime & Avocado Growers v. Jacobsen,* 362 U.S. 73 (1960); *A.F. of L. v. Watson,* 327 U.S. 582 (1946). This Court noted probable jurisdiction on June 29, 1970.

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[2]Jurisdiction was also invoked under the Privileges and Immunities and Supremacy Clauses. The Court below found the "Supremacy argument unpersuasive" and did not reach the Privileges and Immunity Argument, as it "decides the case on Equal Protection grounds" (A. 172).

QUESTIONS PRESENTED BY THE APPEAL

The following questions are presented by this appeal:

(i) Does a state constitutional provision which limits the authority of a public body of such state to develop, construct or acquire low rent housing project for persons of low income without such entity first having obtained the approval of a majority of the qualified electors of the city, town or county, in which it is proposed to develop, construct, or acquire the same, voting on such issue at an election for that purpose, or at any general or special election, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution where the undisputed facts are that, with certain exceptions involving federally-owned housing, housing for public employees and housing for students at state universities and colleges, no other type of publicly-owned housing exists in such state?

(ii) Does a majority of the people of a state have the right to restrict the power of the local public bodies of such state to provide low rent housing to persons of low income of that state, where persons of low income form a "minority" of that state, but where there are in fact no public, middle or high rent projects in existence?

STATEMENT OF THE FACTS OF THE CASE

On November 7, 1950, the voters of the State of California at a general election approved an initiative measure, designated as Proposition 10, which added

Article XXXIV to the California Constitution. Earlier that same year, the California Supreme Court had ruled that referendums were not applicable to decisions to build public housing on the grounds that such decisions were mere administrative acts as opposed to legislative acts.[3] The effect of the Constitutional Amendment was to nullify the decision for future situations where a state public body seeks to acquire public housing. It limited the authority of any state public body to develop, construct or acquire low rent housing without the prior approval of a majority of the qualified electors of the city, town or county in whose jurisdiction the proposed project is to be located, who vote on the issue.

By Resolution No. 28614, dated January 17, 1966, and adopted pursuant to the provisions of Section 34242 of the California Health and Safety Code, the Council of the City of San Jose found a need for low rent housing in its community. This resolution established the Housing Authority of the City of San Jose. Of the seven members then on the Council voting on the resolution, only two were members at the time this suit was filed in the District Court below, namely, Ronald James and Virginia C. Shaffer. Mayor James, then a Councilman, voted in favor of Resolution 28614, whereas Mrs. Shaffer voted against it. It was adopted by a vote of six to one.

Almost three years later, or on November 5, 1968, a special municipal election was held in San Jose as

[3] *Housing Authority v. Superior Court* (June 1950) 35 Cal. 2d 550, 219 Pac. 2d 457.

consolidated with the State of California general election. Measure B on the ballot was as follows:

> "Shall the Housing Authority of the City of San Jose have authority to develop, construct, and acquire, in any manner selected by said Authority, a low rent housing project (as defined in Article XXXIV of the California Constitution), consisting of not more than one thousand dwelling units, subject to the following conditions: (1) not more than four such dwelling units shall be situate in any one structure, (2) not more than one structure containing any such dwelling unit shall be situate on any one lot, and (3) such dwelling units shall be dispersed among various sections of the City so that not more than twenty-four such dwelling units shall be situate within a radius of fifteen hundred feet from any other such dwelling unit."

The measure was defeated by a vote of 68,527 "against" to 57,896 "for" its approval.

It was the combination of the failure of this measure together with the requirements of Article XXXIV and the allegedly increased need for low rent housing units in San Jose which prompted the filing of the action below. Plaintiffs attempt to eliminate what they regard as an unfair obstacle in their path to obtain publicly-owned, low rent housing units for themselves and others of their class. The adult plaintiffs are mothers of the several respective minor plaintiffs. All are welfare recipients, residents of this City, and all live in over-crowded facilities. At least some of the facilities are also sub-standard from the standpoint of health and safety factors.

An uncontroverted affidavit submitted by plaintiffs in support of their Motion for Summary Judgment showed that whereas in November, 1969 the City and the County Housing Authorities leased a total of 1,933 units for sublease at low rent, nevertheless, there was then an immediate need for 1,853 additional units. Whereas, none of the Appellants has admitted in Court that there is a current need for low rent housing units in the City of San Jose, nevertheless none of them has offered any evidence to refute the claim. And for purposes of this Appeal at least, current need is an established fact.

In opposition, however, to the Motion for Summary Judgment below, Appellants prepared a stipulation of fact, entered into by the attorneys for the Appellees which sets forth the types of publicly-owned or leased housing in the State of California. This stipulation established as uncontroverted fact that except for federally-owned housing, housing for certain State employees, housing for college and university students, and housing acquired to clear the way for public projects such as highways, airports, streets, etc., no other type of housing is owned or leased by any state public body of the State of California for residential purposes other than housing for rental to persons of low income, as such persons are defined by Article XXXIV. In other words, with the above exceptions, there is no State, City or County owned or leased housing for rental to persons of middle or high incomes in California.

Also established as uncontroverted fact by plaintiffs' own affidavits, and as already noted above, Appellants, or rather the Housing Authority established by them, have acquired by lease existing housing units in the City of San Jose, for subleasing to persons of low income in this City. Such acquisition by the Housing Authority has never been submitted to the electors of this City for their approval. The reason for this is that the Attorney General of the State of California has rendered an opinion that such type of acquisition does not fall within the requirements of Article XXXIV. (47 Ops. Cal. Atty. Gen. 17, issued January 18, 1966 as Opinion No. 65-246.)

The validity of Section 1 of Article XXXIV of the California Constitution is here involved. The full text of that article is as follows:

"§ 1. *Approval of electors; definitions*

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

"For the purposes of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the

Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term 'low rent housing project' any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

"For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

"For the purposes of this article the term 'state public body' shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State.

"For the purposes of this article the term 'Federal Government' shall mean the United States of America, or any agency or instrumentality, corporate or otherwise, of the United States of America. (Added Nov. 7, 1950.)

"§ 2. *Self-executing provisions*

Sec. 2. The provisions of this article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation. (Added Nov. 7, 1950.)

"§ 3. *Partial validity*

Sec. 3. If any portion, section or clause of this article, or the application thereof to any person or circumstance, shall for any reason be declared unconstitutional or held invalid, the remainder of this article, or the application of such portion, section or clause to other persons or circumstances, shall not be affected thereby. (Added Nov. 7, 1950.)

"§ 4. *Conflicting provisions superseded*

Sec. 4. The provisions of this article shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith. (Added Nov. 7, 1950.)"

ARGUMENT

(i) THE DECISION BELOW INCORRECTLY APPLIES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

It has been said, and Appellants submit correctly so, that all laws discriminate in some manner or other against one class of persons in favor of another, *Hill v. Rae*, 158 Pac. 826 (Mont. 1916). It is clearly the law that such classification must have a reasonable relationship to the purpose for which it is made, *Smith v. Cahoon*, 283 U.S. 553 (1931). The five rules for testing the existence of illegal discrimination were set forth in full by this Court in 1957 when it said,

" '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope

of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore, is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.'" (Citations omitted.)

"To these rules we add the caution that 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'"

Morey v. Doud, 354 U.S. 457, at 463-464 (1957).

Inherent in all of this is the proposition that this Court will not stretch its tests in order to find an unreasonable classification. To cite an example, a state statute drawn for the purpose of licensing and regulating businesses dealing with currency exchanges may be struck down as unconstitutional for the manner in which it treats some of those businesses as opposed to others, but *not* merely because it fails to license and regulate *all* businesses in the state. It is even true that the Equal Protection Clause does not require that every state regulatory statute apply to

all in the same business, *Morey v. Doud* (supra, at 465). When a class is established or singled out by a state law, the concern of the Court is in seeing to it that the tests set forth in *Morey v. Doud* (supra) are met.

Article XXXIV, by its express terms, applies *only* to a "low-rent housing project . . . developed, constructed, or acquired in any manner by any state public body." Appellants submit that the tests of constitutionality under the Equal Protection Clause are met *if* California's treatment of low-rent housing projects is justified in view of California's treatment of "mid" rent or "high" rent housing projects "developed, constructed or acquired in any manner by any state public body." Such is *not* the test, however, applied by the District Court below. The Court below ignores and disregards a stipulation of fact entered into by the Appellants and the Appellees which establishes, with certain noted exceptions, that California has *no* other type of "public" housing except "low-rent housing". Instead, the Court below insists upon comparing California's treatment of low-rent housing projects with its treatment of "all (other) projects", citing as some "common examples": "highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities". (A. 177) Appellants submit that a test such as that used below is the equivalent of testing the licensing and regulatory provisions examined in *Morey v. Doud* (supra) with licensing and regulatory provisions for *all* businesses conducted within the State.

The test applied below makes it impossible to determine what class of persons are treated differently from those expected to benefit from low-rent housing projects. We cannot believe that the Court below was attempting to protect "state agencies" acting on behalf of the poor and the minorities as against "state agencies" acting on behalf of other groups seeking financial Federal assistance. The Fourteenth Amendment does not protect state agencies, *Williams v. Baltimore,* 289 U.S. 36 (1932); *State of Wisconsin v. Zimmerman,* 205 F. Supp. 673 (1962). Yet, according to the opinion, this is precisely what the Court below was attempting to do. (A. 176).

If the Court below was concerned about protecting the poor, as Appellants believe was intended, then how does Article XXXIV's classification become invidious merely because other projects requiring Federal assistance can be developed, constructed or acquired without need for referendum vote? Certainly, the poor benefit from the other projects mentioned by the Court, if not merely as much as, then even more so than do other economic classes. Therefore, it can hardly be argued that the "poor" are discriminated against on that ground.

Secondly, if low rent housing of the type contemplated by Article XXXIV is the only type of public housing which exists in California (A. 69, 70), then there is *no* unequal treatment of the poor merely because the middle class or the wealthy could *theoretically* acquire public housing for their own benefit without a referendum vote. Furthermore, the question

of whether or not Article XXXIV would be constitutional *if* or *when* California does have mid-income or high-income public housing is a hypothetical question and should *not* be decided at this time, *U.S. v. Raines,* 362 U.S. 17 (1960); *Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Board,* 315 U.S. 740 (1942). As a matter of fact, there is *no* legal authority for acquisition of any type of public housing in California other than that defined by Article XXXIV.

(ii) THE JUSTIFICATION FOR THE SINGLING OUT OF LOW-RENT HOUSING PROJECTS FOR REFERENDUM TREATMENT IS REASONABLE, AND SUCH TREATMENT BEARS A REASONABLE RELATIONSHIP TO THE PURPOSE FOR WHICH ARTICLE XXXIV WAS FRAMED.

Article XXXIV was born following the November 7, 1950, general elections in California when Proposition 10 on the state ballot, added by successful state initiative, received a favorable majority vote. (A. 48-54) Just prior to this election, or in June, 1950, the California Supreme Court had held that the acts of a local governing body and housing authority under the Housing Authorities Act of California relative to applications to the Federal housing authority were "executive and administrative", not "legislative", and therefore not reached by the power of referendum, *Housing Authority v. Superior Court,* 219 P.2d 457 (Calif. 1950). Thus, contrary to the circumstances existing in Akron, Ohio, at the time that City's Charter was amended, *Hunter v. Erickson,* 393 U.S. 385, 390 and 392 (ftn. 7) (1969), electors in Cali-

fornia would have no means of disapproving of the acquisition of public housing except (1) as happened, by adding Article XXXIV to the state constitution, or (2) by repealing the Housing Authorities Act of California. Appellants submit that by choosing the former remedy, the voters acted in much the more reasonable and justifiable manner. Article XXXIV leaves open the *authority* for a local entity to acquire housing. It merely conditions that authority by requiring majority approval of the local entity's electorate voting on the issue.

Any housing development proposal, either public or private, presents or creates problems regarding the provision and administration of governmental services which can only be solved at the local level. However, *public* housing projects create fiscal problems which are nonexistent when the same project is owned, operated and maintained by *private* interests. Some of the problems created by both public and private housing developments stem from the need to provide such new residents with adequate police and fire protection, public school facilities, public transportation, and most particularly of late, sewage disposal facilities designed to meet the higher, anti-pollution requirements of recent Federal and State legislation.[4] Public housing projects involve, in addition, considerations such as the amount of contribution required of the local entity and the ability of the local entity to finance any portion of any loan commitment which may be imposed upon the local

[4]32 Law And Contemp. Prob. 490 at 509 (1967).

entity under either the Federal or the State housing assistance program. Also to be considered are the means available, if any, for receiving revenue from the project which would replace the property taxes which no longer would be collectable from the property on which the project is situated. Such revenues should be adequate to pay a proportionate share of the costs of the several services and overhead expenses of the local entity involved with respect to the project. It must also be remembered that, although at any given time in the future one hundred per cent Federal assistance may exist, nevertheless, such assistance will always be subject entirely to the availability of funds. An enabling act without an appropriation act is virtually worthless. And since appropriations can increase, decrease or cease entirely upon the whim or discretion of Congress, potential liability to provide the "underwriting" costs of such a project is of *no* small concern to the local government either.[5]

There are several alternatives to the public housing program in existence today.[6] These provide the local government and its electorate with a choice of the best method of solving any local housing shortage which may exist in the community. Private development in conjunction with an urban redevelopment program is one way. Private development of low-

[5]32 Law And Contemp. Prob. 490 at 509 (1967).

[6]For excellent discussions of the several social and economic problems raised by, and for a discussion of alternatives to Public Housing projects, see: 81 Harv. L. Rev. 1295 (1968); 116 U. Pa. L. Rev. 611 (1968); and 76 Yale L.J. 508 (1967).

rent housing by non-profit groups such as churches and unions is another. Then, there is the lease method of acquisition which has been widely used by cities and counties in California. This method uses existing units built and owned by private interests. Each of the various methods has certain advantages and disadvantages. But to make a claim that outright public ownership is the only satisfactory solution to providing low-rent housing is simply an untenable position.

We submit that these factors justify the concern and desire of the local voters to be involved and consulted in any decision to acquire a public housing project in their community. *Dandridge v. Williams,* 397 U.S. 471 (1970).

One fact should be evident to any person faced with the question of whether or not his community should have publicly-owned low-rent housing. That fact is simply that the question is one primarily of a *political* and *fiscal* nature. It is in the same nature as questions raised by bond elections. The point is, the question is *not* whether we should treat "A" differently from "B" by giving A's class public housing, while we deprive B's class of public housing. There is only *one* "class" which receives the benefit of *public* housing in California, and so the question asked by an Article XXXIV referendum is simply whether or not to provide public housing at all.

Appellees have argued, and the District Court has agreed with the point (A. 174), that the referendum requirement of Article XXXIV is a special burden

upon the poor. Accepting that label or description of the referendum process as accurate for the sake of argument only, nevertheless, such fact does not thereby place Article XXXIV at odds with the protection offered by the Equal Protection Clause. It has long been the accepted principle of this Court that special burdens are often necessary for general benefits. *Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment. Barbier v. Connolly,* 113 U.S. 27 at 31-32 (1885); *Atchison T. & S.F. Ry. Co. v. Matthews,* 174 U.S. 96 at 103-107 (1899); *Mountain Timber Co. v. Washington,* 243 U.S. 219 at 243-46 (1917); *Truax v. Corrigan,* 257 U.S. 312 (1921); *Douglas v. California,* 372 U.S. 353 (1963). Federal and State legislation confers or enables the privilege of public housing. When that very legislation leaves it up to the decision of the local community, and Article XXXIV merely prescribes the procedure for making that local decision,[7] it does not follow that Article XXXIV treats one class differently from another. On the contrary, *Article XXXIV, within the sphere of its operation, affects alike all persons similarly situated.* If the poor want the affluent to provide them with housing, it would seem only reasonable that they should expect and be willing to accept the "burden" of receiving the willing con-

[7] 42 U.S.C. §§ 1401, 1402 (11), 1409, 1410, 1411 and 1415 (7).

sent of a simple majority of those persons who are expected to help pay for that housing and its correlative needs. According to Appellee's own evidence, a majority of those persons voted "yes" to such projects in 70% of the elections conducted during the ten year period from 1958 through 1967. (A. 35-37) Such a showing is hardly justification for the invalidation of a state constitutional measure calling for a referendum, even if the results were less successful.

The District Court below found no merit in plaintiffs' Supremacy Clause argument. (A. 172). There simply is no compelling Federal policy or law which dictates to or places mandatory duties upon local governmental agencies (or their voters) relative to the Federal public housing program. The process of deciding political issues at the state or local level by referendum has been expressly approved by this Court as early as 1915, *Ohio v. Hildebrant,* 241 U.S. 565 (1916). What Appellants urge is that, as long as local legislative bodies *do* have discretionary powers, *Morey v. Doud* (supra); *DayBrite Lighting, Inc. v. Missouri,* 342 U.S. 421 (1951); *Sproles v. Binford,* 286 U.S. 374 (1932), and to the extent they so do, this discretion can be limited or shared by the more supreme power, the power of the people themselves acting within, and in concert with, their Constitutional rights, *Cochran v. Louisiana State Bd. of Education,* 281 U.S. 370 (1930).

(iii) THE CASE OF HUNTER v. ERICKSON, RELIED UPON BELOW, IS DISTINGUISHABLE FROM THE CASE AT BAR.

As already stated above (p. 13), in *Hunter,* the legislation dealt with by the Akron Charter provision was of the type which the electorate could have reviewed at any time under the general referendum and initiative procedures (393 U.S. 392-93). By reason of California Supreme Court decision, however, the decision to apply for Federal financing, or simply to acquire public housing, is not a decision which can be reached by referendum. Thus, only by means of amendment to the State Constitution (which defines the referendum power reserved to the California electorate) could that electorate participate at the local level in the administrative (and political) decision to acquire public housing.

The Akron Charter provision also differed from Article XXXIV in that the Charter provision was a limitation upon the authority of the City Council to adopt *legislation.* Article XXXIV does not concern itself with legislation. Article XXXIV deals merely with an administrative, fiscal and political decision to acquire or not to acquire public housing. It is precisely the type of question with which this Court has in the past refused to become involved, *Highland Farms Dairy v. Agnew,* 300 U.S. 608, 612 (1937); *State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.,* 281 U.S. 74 (1930); *Hughes v. Superior Court,* 339 U.S. 460, 466-67 (1950). Legislative process is, on the other hand, a more delicate and crucial matter, the interference with or restriction of which

might well deserve more careful scrutiny by the Courts. In that sense, this Court's concern in *Hunter* can be explained. However, in the case at bar, it is only the *method* (i.e., the referendum) by which the local governmental entity is compelled to arrive at its own decision which Appellees challenge. And in this latter sense, the concern of this Court as enunciated in *Hunter* does not and should not apply.

Again, unlike the Akron Charter provision in *Hunter,* Article XXXIV repealed no valid existing law intended to prohibit discrimination. Appellants realize that it was not crucial to this Court's decision in *Hunter* that the Akron Charter Amendment did repeal existing legislation intended to prohibit racial discrimination. (393 U.S. at 390, ftn. 5). Nevertheless, it seems obvious enough to Appellants that such attempts at the local level to thwart anti-discrimination efforts are not looked upon by this Court with great favor, *Reitman v. Mulkey,* 387 U.S. 369 (1967). But whether or not the mere repeal of an existing ordinance can violate the Fourteenth Amendment, Article XXXIV does *not* do so. Article XXXIV merely conditions the authority of the local or State legislature to acquire public housing. The condition is that the legislature first seek approval of a majority of the electors voting on the issue in the community where the project is to be located.

Again, unlike the city charter provision in *Hunter,* Article XXXIV does *not* address itself to discrimination, either racial, economic or otherwise. Its subject matter is strictly low-rent housing projects. It does

not permit or condone discrimination any more so than does any other voting process.

To strike down Article XXXIV merely because it might allow a majority of voters to deny housing for the poor would be to undermine the very heart of the democratic system itself. Such a decision would necessarily weaken a state's right to present *any* social issue to the voters for decision. Appellants do *not* claim that the "majority" may discriminate against the "minority". Nor do Appellants claim that a popular referendum immunizes the result from judicial review. But it *is* the claim of Appellants that *an electorate has the right to demand* **in advance** *that* **any** *given issue, other than those already decided by the U.S. Constitution, be decided at the polls rather than by elected representatives.*[8] "The power to enact laws and control public servants lies with the great body of the people." *Pacific States T. & T. Co. v. Oregon,* 223 U.S. 118 at 145 (1912); *Cochran v. Louisiana State Bd. of Educ.,* 281 U.S. 370 at 374 (1930). In an age when the popular cry of the "minorities" is "Power to the People", it seems ironic that it should now be Appellants, elected city officials, often commonly referred to as "the establishment", who are now called upon to defend that "power" against the attack of those claiming to be in the minority, *Reynolds v. Sims,* 377 U.S. 533 (1964); *Harper v. Virginia Board of Elections,* 383 U.S. 633 (1966). For what lawful power does any citizen have over his government other than that which he exercises at the polls?

[8]Ninth and Tenth Amendments to U. S. Constitution.

Appellants submit that the type of provision contained in the Akron Charter in *Hunter* amounted to "state action" to sanction private racial discrimination. Appellants realize that the state action theory was not used in *Hunter* in arriving at this Court's opinion. Perhaps one reason was that, unlike laws in other cases where this theory was used (*Reitman v. Mulkey,* 387 U.S. 369, for example) the Akron Charter provision referred *specifically* to racial and religious discrimination laws. Thus, the evil of the challenged provision was not merely that it encouraged or sanctioned private discrimination (as it did) but that it amounted to unfair discrimination in and of itself. Actually, however, looking at the ultimate effect of the Akron Charter, its evil of sanctioning or encouraging private racial discrimination is considerably more serious than the "vice" of making it more difficult for one group to obtain legislation than another group.

But unlike *Hunter,* the challenged provision in this case has nothing whatever to do with racial or religious discrimination. The "discrimination" of Article XXXIV is the same as that inherent in *any* law dealing in relief of social problems. It singles out a particular form of social benefit, and deals exclusively with that subject alone. So too, does other social benefit legislation. It provides the procedure whereby such benefit may be extended. The procedure involves simple majority approval of the proposal in the community where it is to be placed. Such requirement is no more inherently discriminatory than is any law

requiring voter approval. It has been said time and again that the referendum procedure is neutral, *Ranjel v. City of Lansing,* 417 F.2d 321 (6th Cir. 1969), cert. den. 397 U.S. 980 (1970); *Spaulding v. Blair,* 403 F.2d 862 (4th Cir. 1968). This being so, a law which requires a referendum to decide an issue can hardly be said to be less neutral.

SUMMARY ARGUMENT

In brief summation, this case involves the validity of a method used by California, for making a political decision with respect to the State's participation in the Federal program to provide public housing. We do not make the claim that Article XXXIV best fulfills the relevant social and economic objectives of California or of the Federal government. We do claim that the decision below is an attempt to solve by judicial process the "intractable economic, social, and even philosophical problems presented by public welfare assistance programs", *Dandridge v. Williams,* 397 U.S. 471 (1970), whereas such is not the business of this Court, *Ferguson v. Skrupa,* 372 U.S. 726 (1963). Congress has approved of this method of making such decision. We submit that the decision of Congress in this case falls within its Article IV, Section 4 power and that such decision is one solely for Congress to determine. *Ohio ex rel. Davis v. Hildebrant,* 241 U.S. 565 at 567-68 (1916).

CONCLUSION

Appellants submit (1) that the Court below applied an incorrect test to determine whether the equal protection clause of the Fourteenth Amendment of the Federal Constitution had been violated; (2) that there is a reasonable justification for singling out Low-Rent Housing Projects for referendum treatment and that such treatment bears a reasonable relationship to the purpose for which Article XXXIV was framed; (3) that the case of *Hunter v. Erickson,* heavily relied on by the Court below is distinguishable from the case at bar. The Court below should have granted Appellants' Motion to Dismiss. Appellants therefore respectfully urge a reversal of the decision below.

Dated, San Jose, California,
September 3, 1970.

Respectfully submitted,
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